ONE HUNDRED SIXTH CONGRESS

Congress of the United States

House of Representatives

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May 10, 2000

BY FACSIMILE

The Honorable Gary S. Guzy
General Counsel
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Mr. Guzy:

As you know, I have long been concerned that the Environmental Protection Agency (EPA) might assert jurisdiction to launch a regulatory global warming mitigation program without Congressional authorization. In this letter, I examine EPA's claim of authority to regulate carbon dioxide (CO_2) in light of a recent Supreme Court decision, Food and Drug Administration (FDA) v. Brown & Williamson (120 S.Ct. 1291, March 21, 2000).

In that case, the Supreme Court overturned FDA's regulation of tobacco products as exceeding FDA's Congressionally-delegated authority. The Court concluded that courts "must take care not to extend the scope of a statute beyond the point where Congress indicated it would stop" (Brown & Williamson, p. 1315, internal citation omitted). I believe that the Court's reasoning confirms my analysis that EPA lacks legal authority to regulate CO_2, but I would appreciate having your thoughts on this matter.

Therefore, pursuant to the Constitution and Rules X and XI of the United States House of Representatives, I request that you address the questions enumerated in the enclosure, commenting as appropriate on the principles enunciated by the Supreme Court in the Brown & Williamson case and their implications for EPA's legal authority with respect to CO_2.

Please deliver your response to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building by Friday, June 5, 2000. If you have any questions about this request, please call Subcommittee Counsel Bill Waller at 226-2067 or Staff Director Marlo Lewis at 225-1962. Thank you for your attention to this request.

Sincerely,

David McIntosh

David M. McIntosh
Chairman
Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs

Enclosure

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich
The Honorable John Dingell

Q1. In Food and Drug Administration (FDA) v. Brown & Williamson (120 S.Ct. 1291, March 21, 2000), the Supreme Court overturned FDA's regulation of tobacco products as exceeding the authority Congress had delegated to FDA. FDA argued as follows: The Federal Food, Drug, and Cosmetic Act (FDCA) authorizes FDA to regulate "drugs" and "devices;" nicotine can be considered a "drug;" cigarettes and smokeless tobacco can be considered "devices" for delivering nicotine to the body; therefore, FDCA authorizes FDA to regulate cigarettes and smokeless tobacco. The Environmental Protection Agency's (EPA's) argument with respect to carbon dioxide (CO_2) is strikingly similar. According to EPA, the Clean Air Act (CAA) authorizes EPA to regulate "air pollutants;" CAA section 103(g) lists CO_2 among several "air pollutants;" therefore, EPA may regulate CO_2.

In Brown & Williamson, the Court cautioned against agencies inferring grants of authority from the "definitional possibilities" of statutory language taken out of context. The Court stated: "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." The Court also cited Brown v. Gardner (513 U.S. 115, 118, 1994): "Ambiguity is a creature not of definitional possibilities but of statutory context" (Brown & Williamson, p. 1300-01). As I have noted in previous correspondence with you, the context for the CAA's sole mention of CO_2 – section 103(g) – is a non-regulatory provision. Moreover, that provision concludes with the admonition that "Nothing in this subsection [i.e., including the reference to CO_2 as an 'air pollutant'] shall be construed to authorize the imposition on any person of air pollution control requirements." Additionally, in a October 5, 1999 letter to Chairman McIntosh, Congressman John Dingell explained: "While it [section 103(g)] refers, as noted in the EPA memorandum, to carbon dioxide as a 'pollutant,' House and Senate conferees never agreed to designate carbon dioxide as a pollutant for regulatory purposes."

EPA's argument appears to suffer from the same flawed reliance on "definitional possibilities" that the Court found in FDA's claim of authority to regulate tobacco products. Do you agree? If not, please explain why you believe the Court's reasoning does not apply to EPA's attempt to use the words "air pollutants" and "carbon dioxide" in section 103(g) as a source of regulatory authority. Specifically, please identify the "statutory context" that explains and justifies EPA's argument.

Q2. In the Brown & Williamson case, the Court noted that: "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" In addition, the Court stated that "A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a harmonious whole'" (Brown & Williamson, p. 1301, internal citations omitted). These words are telling, because the CAA contains no "overall statutory scheme" with respect to greenhouse gases or global warming. Furthermore, as noted in previous correspondence, CO_2 does not fit harmoniously in any regulatory provision of the CAA. For example, regulating CO_2 under the national ambient air quality standards (NAAQS) program would be an attempt to address a global phenomenon of the troposphere (the greenhouse effect) through a regulatory structure designed to address local or regional conditions of the ambient air.

Similarly, regulating CO_2 under the hazardous air pollutant (HAP) program would be an attempt to control a benign substance as though it were a toxic substance. In short, EPA regulation of CO_2 under the CAA would create *incoherent* and *asymmetrical* regulatory schemes. Do you agree? If not, please explain how the NAAQS or HAPs programs might be stretched to include CO_2 without incoherence, disharmony, or asymmetry.

Q3. The Court in Brown & Williamson partly based its decision on legislative history. It stated, "In fact, on several occasions ... Congress considered and rejected bills that would have granted FDA such jurisdiction" [i.e., authority to regulate tobacco products] (Brown & Williamson, p. 1307). The Court also noted that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand" (Brown & Williamson, p. 1301). Likewise, Congress considered and rejected greenhouse gas regulation when it enacted the 1990 CAA Amendments. Congress subsequently and more specifically rejected regulatory approaches to addressing global climate change and emissions of greenhouse gases when it enacted the omnibus Energy Policy Act of 1992. Do you agree that Congressional rejection of legislation to grant EPA authority to regulate CO_2 supports the conclusion that EPA currently lacks such authority? If EPA does not agree, please explain why.

Q4. In Brown & Williamson, the Court partly based its decision on the common sense of the matter. It stated that courts "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency" (Brown & Williamson, p. 1301). Moreover, the Court explained that unlike an implicit delegation from Congress to fill in minor statutory gaps, "it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, [regulated] to agency discretion" (Brown & Williamson, p. 1315, internal citation omitted). This analysis applies with even more force to a regulatory global warming mitigation program. Whereas tobacco regulation would primarily affect just one industry, CO_2 regulation would directly affect whole economic sectors, including energy production, transportation, manufacturing, and agriculture. Do you agree that establishing a regulatory global warming mitigation program involves a policy decision of at least the "economic and political magnitude" as the regulation of tobacco products, and, therefore, that it is highly unlikely Congress would leave the determination of whether CO_2 will be regulated to EPA's discretion? If EPA does not agree, please explain why.

Q5. Do you agree that that the Supreme Court's reasoning in Brown & Williamson makes it less likely that the courts would uphold an attempt by EPA to regulate CO_2? If EPA does not agree, please explain why.